SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–50 OF 2009(W)
ZAKI AZMI CHIEF JUDGE, ZULKEFLI AND GOPAL SRI RAM FCJJ
16 OCTOBER 2009

Administrative Law — Exercise of administrative powers — Detention — Application for habeas corpus — Whether advisory board failed to prove that recommendations were made to Yang di-Pertuan Agong within three months prescribed by art 151 of the Federal Constitution and s 6(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether safeguards in art 151 and s 6(1) complied with — Whether detainee entitled to rely on version of evidence most favourable to him where contradicting evidence tendered by detaining authority

Preventive Detention — Detention order — Application for habeas corpus — Whether advisory board failed to prove that recommendations were made to Yang di-Pertuan Agong within three months prescribed by art 151 of the Federal Constitution and s 6(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether safeguards in art 151 and s 6(1) complied with — Whether detainee entitled to rely on version of evidence most favourable to him where contradicting evidence tendered by detaining authority

The appellant was ordered to be detained for a period of two years pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The appellant made representations against the making of the order to the advisory board constituted under art 151 of the Federal Constitution. Under art 151(1)(b) and by virtue of s 6(1) of the Ordinance, the board must consider the representations and make its recommendations thereon to the Yang di-Pertuan Agong within three months of receiving the representations. The first respondent in his affidavit dated 31 March 2009 stated that the board had not as at the date of his affidavit made its recommendations. However this was contradicted by the secretary to the board who in his affidavit stated that the board's recommendations were made on 13 January 2009. No attempt was made to explain the discrepancy in the dates. The High Court refused to issue habeas corpus for the appellant's release and hence this appeal.

Held, allowing the appeal:

(1) On an application for habeas corpus the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. Therefore, it was for the respondents to prove that the safeguards embodied in art 151 and s 6(1) were strictly complied with (see paras 5–6).

(2) One of the tests that a court applies to test allegations in affidavits is to see whether they are contradictory in nature. Where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is entitled to rule that the burden has not been discharged. In a matter as important as individual liberty, where contradictory averments are made on oath, the detainee is entitled to rely on the version that is most favourable to him (see para 6).

(3) The respondents had failed to show that the recommendations of the advisory board were made to His Majesty within the three months prescribed by art 151 and s 6(1). In these circumstances, habeas corpus should have been issued by the High Court (see para 7).

[Bahasa Malaysia summary

Perayu telah diperintahkan untuk ditahan untuk tempoh selama dua tahun di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan'). Perayu membuat representasi terhadap pembuatan perintah tersebut kepada lembaga penasihat yang ditubuhkan di bawah perkara 151 Perlembagaan Persekutuan. Di bawah perkara 151(1)(b) dan berikutan s 6(1) Ordinan, lembaga tersebut mesti mempertimbangkan representasi tersebut dan membuat cadangan-cadangannya kepada Yang di-Pertuan Agong dalam masa tiga bulan selepas menerima representasi itu. Responden pertama dalam afidavitnya bertarikh 31 Mac 2009 menyatakan bahawa lembaga tersebut setakat tarikh afidavitnya tidak membuat cadangan-cadangannya. Walau bagaimanapun ini disangkal oleh setiausaha kepada lembaga yang dalam afidavitnya menyatakan bahawa cadangan-cadangan lembaga telah dibuat pada 13 Januari 2009. Tidak ada apa-apa percubaan dibuat untuk menjelaskan percanggahan dalam tarikh-tarikh tersebut. Mahkamah Tinggi enggan mengeluarkan habeas corpus untuk pembebasan perayu dan maka rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Dalam suatu permohonan untuk habeas corpus beban untuk memuaskan mahkamah bahawa penahanan tersebut adalah sah di sisi

undang-undang adalah sepanjang masa diletakkan ke atas pihak berkuasa yang menahan. Oleh itu, ianya adalah untuk responden-responden membuktikan bahawa perlindungan yang ditetapkan dalam perkara 151 dan s 6(1) dipatuhi dengan tegasnya (lihat perenggan 5–6).

(2) Salah satu ujian yang digunakan oleh mahkamah untuk menguji dakwaan-dakwaan dalam afidavit-afidavit adalah melihat sama ada ia bersifat bercanggah. Apabila beban pembuktian terletak pada satu pihak dan ia mengemukakan keterangan yang bertentangan atau bercanggah, mahkamah dalam menaksir keterangan tersebut adalah berhak untuk memutuskan bahawa beban belum dilaksanakan. Dalam satu perkara yang penting seperti kebebasan individu, di mana kenyataan yang bercanggah dibuat atas sumpah, pihak yang ditahan adalah berhak untuk bergantung pada versi yang paling berpihak kepadanya (lihat perenggan 6).

(3) Responden-responden telah gagal menunjukkan bahawa cadangan-cadangan oleh lembaga penasihat telah dibuat kepada Yang di-Pertuan Agong dalam tiga bulan seperti yang ditetapkan oleh perkara 151 dan s 6(1). Dalam keadaan-keadaan ini, habeas corpus sepatutnya dikeluarkan oleh Mahkamah Tinggi (lihat perenggan 7).]

Notes

For cases on application for habeas corpus, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1306–1329.

For cases on detention, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 22–23.

Cases referred to

Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals [1989] 1 MLJ 69, CA (folld)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (folld)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81, FC (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321; [2002] 4 CLJ 309, FC (refd)

Mohinuddin v District Magistrate, Beed AIR 1987 SC 1977 (folld)

Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293, SC (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3, 4, 4(1), (4), 6(1)

Federal Constitution arts 5(3), 151, 151(1)(b)

Indian Constitution [IND] art 22

Internal Security Act 1960 ss 8, 73

Appeal from: Criminal Application No 44–51 of 2009 (High Court, Kuala Lumpur)

Baljit Singh (Abd Shukor Ahmad with him) (Shukor Baljit & Partners) for the appellant.
Najib bin Zakaria (Legal Advisor, Ministry of Home Affairs, Malaysia) for the respondents.

Gopal Sri Ram FCJ:

[1] This is an appeal against the refusal of the High Court to issue habeas corpus for the appellant's release from custody. The relevant facts of the case are these. On 17 November 2008, the Minister for Home Affairs, the first respondent before us, made an order directing the appellant's detention for a period of two years. The order was made pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') which provides:

> 4(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years.

[2] Pursuant to sub-s (4) of the same section, a statutory statement setting out the facts and grounds of his detention (also dated 17 November 2008) was served upon the appellant. On 18 November 2008, the appellant made representations against the making of the order to the advisory board constituted under art 151 of the Federal Constitution. Under cl (1)(b) of that article and by virtue of s 6(1) of the Ordinance, the board must consider the representations and make its recommendations thereon to the Yang di-Pertuan Agong (in truth His Majesty acting on the advice of the Minister) within three months of receiving the representations in question or within such longer period as the Yang di-Pertuan Agong may allow. The advisory board entertained the appellant's representations. But it is uncertain as whether it made its recommendations to His Majesty within the constitutionally prescribed three month period which in the present instance expired on 17 February 2009. I will say why in a moment. Returning to the mainstream, the appellant on 17 March 2009 filed an application for an order of habeas corpus which was heard and dismissed by the learned judicial commissioner.

[3] Before us one of the main grounds urged in support of the appeal is that the detention is bad because the board failed to make its recommendations within the constitutionally and statutorily prescribed three month period; no question of any extension arising in this case. In the alternative it is submitted that at best the burden of showing that the recommendations were made within time had not been discharged by the respondents. This latter submission brings into sharp focus the uncertainty of which I spoke of earlier.

[4] There appears to be a sharp conflict in and between the affidavit evidence produced by the respondents in answer to the appellant's application for habeas corpus. The first respondent in para 15 of his affidavit dated 31 March 2009 categorically states that the board had not as at the date of his affidavit made its recommendations to the Yang di-Pertuan Agong. This however is contradicted by the secretary to the board who in his affidavit of 20 April 2009 states that the board's recommendations were made to His Majesty on 13 January 2009. It is significant that even after the secretary to the board had filed his affidavit, no attempt was made to explain the discrepancy in the dates. How then is the issue to be resolved?

[5] In my considered judgment the point at stake falls to be resolved with reference to the principles governing the burden of proof in an application for habeas corpus. It is settled law that on an application for habeas corpus the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69. In *Mohinuddin v District Magistrate, Beed* AIR 1987 SC 1977, the Supreme Court of India observed as follows in the context of art 22 of the Indian Constitution from which is drawn our art 151:

> It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the state to satisfy the court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in art 22(5).

[6] So too here. It is for the respondents to prove that the constitutional and statutory safeguards embodied in art 151 and s 6(1) were strictly complied with. The liberty of an individual should not be infringed upon even to the slightest extent without proof that the impugned infringement is in accordance with the Constitution and statute. When considering whether a restraint upon liberty is in accordance with law it is to the evidence furnished by the detaining authority that a court must turn in the usual way.

And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection. One of the tests that a court applies to test allegations in affidavits is to see whether they are contradictory in nature. See *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212. Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him. Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn. I must therefore respectfully reject the invitation of learned senior federal counsel to accept the secretary's evidence and reject that of the Minister as inaccurate. Both affidavits were filed on behalf of the detaining authority and it is not, generally speaking, in accordance with the principles governing the evaluation of affidavit evidence that one deponent's version of the facts should be preferred to another when both are giving evidence for the same side.

[7] Applying the principles I have referred to earlier in this judgment, it is my considered view that the respondents have failed to show that the recommendations of the advisory board were made to His Majesty within the three months prescribed by art 151 and s 6(1). In these circumstances habeas corpus should have been issued by the High Court. Although the learned judicial commissioner in his judgment considered the points raised by the appellant he unfortunately overlooked this aspect of the case and as such his judgment is flawed and cannot stand.

[8] In his oral and written arguments the appellant raised additional grounds in support of the appeal. Among these is the sustained submission that s 3 of the Ordinance (which has to do with the arrest of persons by the police) should be read together with s 4. The appellant relies on the following proposition which is extracted from the headnote to the report of *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293 which was a decision that considered the equipollent sections in the Internal Security Act 1960:

> The police power of arrest and detention under s 73 of the Internal Security Act could not be separated from the ministerial power to issue an order of detention. There is only one preventive detention and that is based on the order to be made by the Minister under s 8 of the Act. However, the Minister will not be in a position to make that order unless information and evidence are brought before him, and, for this purpose, the police are entrusted by the Act to carry out the

necessary investigation and, pending inquiries, to arrest and detain a person in respect of whom the police has reason to believe that there exists grounds which would justify the detention of such person under s 8 of the Act.

[9] This court in two decisions namely, *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2002] 4 CLJ 309 and *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 departed from *Theresa Lim Chin Chin* on this point. The appellant's argument is that this departure is an error. It is submitted that a violation of the detenu's rights guaranteed by art 5(3) of the Federal Constitution at the stage of his arrest, whether under s 3 of the Ordinance or s 73 of the 1960 Act would taint and render invalid the detention order made under s 4 of the Ordinance or s 8 of the aforesaid Act. While I do not say that these arguments are without merit — indeed I express no view upon them — I find it unnecessary to deal with them by reason of the conclusion I have reached. Any view I express upon the point will be purely obiter.

[10] For the reasons already given I would allow the appeal and order the respondents to produce the appellant before this court to be set at liberty forthwith.

[11] The Chief Justice and my learned brother Zulkefli bin Ahmad Makinudin FCJ have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Kanesh Sundrum